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No. 92-1102

In the Supreme Court of the United States

OCTOBER TERM, 1992

RONALD D. GRAF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether due process requires that military judges have a fixed term of office.

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-42a, is reported at 35 M.J. 450. The decision of the Navy-Marine Corps Court of Military Review on the issue raised in the petition, presented to that Court in the form of a motion to disqualify, Pet. App. 44a-52a, is reported at 32 M.J. 809. The subsequent opinion of that court on the merits of petitioner's assignment of errors, Pet. App. 55a-62a, is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 30, 1992. The petition for a writ of certiorari was filed on December 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Pursuant to a plea agreement, petitioner pleaded guilty to 13 offenses under the Uniform Code of Military Justice (UCMJ), Articles 80, 81, 92, 107, 112a, 121, 130, and 134, 10 U.S.C. 880, 881, 892, 907, 912a, 921, 930, and 934. Petitioner's pleas encompassed two counts of conspiracy, one to commit espionage and one to commit larceny; the violation of a general regulation governing the safeguarding of classified materials; a false official statement; two counts of attempted sale of aircraft parts; three counts of larceny of a total of $151,350 worth of aircraft parts, technical manuals and circuit boards; housebreaking; and the willful destruction of a public document.[1] Petitioner was sentenced to five years' confinement, a dishonorable discharge, total forfeitures of pay and allowances, a $100 fine, and a reduction to pay grade E-1. In accordance with the pretrial agreement the convening authority reduced the discharge to a bad-conduct discharge, suspended forfeitures in excess of $450 per month for three years, mitigated the fine to equivalent forfeiture, and approved the remainder of petitioner's sentence as adjudged. On appeal, the Navy-Marine Corps Court of Military Review affirmed the findings and sentence as approved by the convening authority. The Court of Military Appeals granted review on two issues raised by petitioner and affirmed.

1. Military trial and appellate judges are part of a comprehensive system of criminal justice established by the Uniform Code of Military Justice. The Court of Military Appeals sits atop the military justice system. That

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[1] The pretrial agreement allowed petitioner to plead not guilty to certain charges and in some instances to plead by exceptions and substitutions to lesser included offenses. The agreement obligated the government to dismiss the remaining charges with prejudice at sentencing. Tr. 101.

court is composed of civilian judges appointed by the President, with the advice and consent of the Senate. The judges of that court hold office for a fixed term of years and can be removed only on specified grounds. Arts. 67 and 142, UCMJ, 10 U.S.C. 867 and 942 (1988 & Supp. III 1991). Below that court are the courts of military review and the trial judges. The Judge Advocates General of the armed services[2] are responsible for detailing judges to sit at those levels of the military justice system, in accordance with regulations adopted by the Secretary concerned. Arts. 6(a), 26(a) and (c), and 66(a), UCMJ, 10 U.S.C. 806(a), 826(a) and (c), and 866(a).[3] Military trial judges and judges on the courts of military review do not hold office for any fixed term. See generally Pet. App. 14a-26a.

2. The offenses of which petitioner stands convicted arose out of a casual conversation at a New Year's party between petitioner and two other men, Airman Apprentice Donald King and John LeBlanc. During the conversation, petitioner and King claimed to be in a position to steal aircraft parts from their duty station, the Naval Air Station in New Orleans, Louisiana, because they were employed in the supply section there. Unbeknownst to petitioner and King, LeBlanc was an undercover informant working for the Naval Investigative Service (NIS). The NIS decided to conduct a "sting" operation to explore the significance of those remarks.

One month later, LeBlanc contacted petitioner to ascertain whether petitioner "could still get parts off the

[2] The Judge Advocates General are defined as "the Judge Advocates General of the Army, Navy, and Air Force and, except when the Coast Guard is operating as a service in the Navy, the General Counsel of the Department of Transportation." Art. 1(1), UCMJ, 10 U.S.C. 801(1).

[3] The above-cited provisions of the UCMJ are reprinted in the addendum to the petition.

base." Tr. 208. Assured that he could, LeBlanc gave petitioner a list of stock part numbers corresponding to classified circuit boards and other supply items. Petitioner and King discovered that two of the listed parts were available on the base. They obtained the parts by creating a false requisition order. On February 27, 1989, petitioner delivered the requested circuit boards to LeBlanc and received $100. Before the circuit boards were delivered, petitioner stole and delivered to LeBlanc, apparently unsolicited, other aircraft parts.

In his subsequent confession to the NIS, petitioner stated that he believed LeBlanc's representations that LeBlanc was operating as a purchasing agent for "an arms broker and that the parts he stole were going to Iran." Tr. 209. Other parts were solicited by LeBlanc and procured by petitioner and King. Petitioner and King expected to receive $8,000 for the delivered parts and expected to negotiate a price for other stolen materials at a planned March 3, 1989, rendezvous with the fictional broker. At that meeting petitioner and King were arrested. Petitioner confessed readily and claimed that he had acted in order to extricate himself from a $1,000 personal debt. *Ibid.*

3. Because petitioner pleaded guilty, the trial judge's role was limited to inquiring into the providence of the pleas and presiding over the voir dire of the court-martial panel members, who determined the sentence. Nonetheless, petitioner challenged the judge for cause, claiming that due process was violated because the judge lacked a fixed term of office. Pet. App. 5a-10a. The trial judge denied petitioner's challenge. *Id.* at 10a.

4. On appeal before the Navy-Marine Corps Court of Military Review, petitioner moved to disqualify the judges hearing his case on the ground that their lack of a specific term of office deprived them of institutional independence. The court denied his motion. Pet. App. 43a-

52a. The court held that since the absence of tenure cannot be equated with personal receipt of a direct financial benefit, the provisions in the UCMJ allowing military trial and appellate judges to be reassigned on the order of a superior officer are not unconstitutional under *Tumey* v. *Ohio*, 273 U.S. 510 (1927), and *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972). Pet. App. 47a-49a. Moreover, the court held that military law has long deemed command influence impermissible, but has also required some showing of prejudice, not merely speculation, to support a claim of bias. *Id.* at 49a-50a. Finally, the court noted that tenure could not eliminate all risk of command influence, because military judges would still receive periodic fitness reports, which theoretically could affect their military careers to a greater degree than reassignment to other military duties. The court therefore concluded that the absence of tenure is simply a factor for the courts to consider in determining whether command influence has prejudiced a defendant in court-martial proceedings. *Id.* at 50a-52a.

The court of military review thereafter rejected petitioner's challenges to his convictions and upheld his sentence. Pet. App. 55a-62a.

5. The Court of Military Appeals affirmed. Pet. App. 1a-42a. The Court observed that, before 1968, the historical practice not only excluded any form of judicial tenure for the presiding officer of a court-martial, but dispensed with the judge as well, relying instead on courts-martial consisting of officers who were "advised by civilian or military lawyers but not controlled by them." *Id.* at 33a. The court concluded that the lack of a fixed term did not impair the ability of military judges to carry out their duties impartially in light of other guarantees of independence found in the Uniform Code of Military Justice. *Id.* at 34a-39a.

ARGUMENT

Petitioner maintains that his court-martial and appeal to the court of military review were fundamentally unfair, because the judges of those courts do not enjoy a fixed term of office and can be reassigned to other military duties by the Judge Advocate General based on his evaluation of their performance as judges. The courts below correctly rejected that claim, and their decisions do not warrant review by this Court.

Nothing in the text of the Constitution supports petitioner's claim. Although the Constitution establishes terms of office for certain Officers of the United States,[4] it specifies no term for others, including officers of the armed forces.

History likewise does not support petitioner's argument. For more than 300 years, neither English nor American military judges have enjoyed tenure in that office. W. Winthrop, *Military Law and Precedents* 179-204 (2d ed. 1920); Pet. App. 33a-34a. The method of assigning military judges permitted by the UCMJ therefore does not offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina* v. *California*, 112 S. Ct. 2572, 2577 (1992) (quoting *Patterson* v. *New York*, 432 U.S. 197, 202 (1977), and *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934)); *Herrera* v. *Collins*, 113 S. Ct. 853, 864 (1993).[5] This Court's cases are consistent with that

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[4] See U.S. Const. Art. I, § 2, Cl. 1 (Representatives hold office for two years); Art. I, § 3, Cl. 1 (Senators hold office for six years); Art. II, § 1, Cl. 1 (President and Vice-President hold office for the same four-year term); Art. III, § 1 ("Judges" of the "supreme and inferior Courts" hold office "during good Behaviour").

[5] Petitioner maintains that the test articulated in *Medina* should not be applied in cases involving the federal government, because federalism concerns are not applicable in that setting. He argues that the three-part test used in *Mathews* v. *Eldridge*, 424 U.S. 319

conclusion. As this Court explained in *Toth* v. *Quarles*, 350 U.S. 11, 17 (1955): "[T]he Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will." See also *Palmore* v. *United States*, 411 U.S. 389, 410 (1973) (due process does not require life tenure for judges).

Petitioner relies heavily on the fact that state court judges generally hold a fixed term of office. Pet. 13-16. But that does not help petitioner's argument. Whether elected or appointed, state judges are part of the State's political process. Cf. *Gregory* v. *Ashcroft*, 111 S. Ct. 2395 (1991); *Chisom* v. *Roemer*, 111 S. Ct. 2354 (1991). States are free to select terms of office for persons who hold any such position. The military, by contrast, is "a specialized society separate from civilian society." *Parker* v. *Levy*, 417 U.S. 733, 743 (1974). While military judges perform the same judicial responsibilities as their civilian counterparts, they nevertheless are members of the armed forces. Officers serving as military judges may be reassigned in the same manner as other officers, as long the procedure for making those transfers does not violate servicemembers' right to a fair trial.

(1976), should be used instead. Pet. 11-12. That claim is meritless. The text of the Due Process Clause is the same in both the Fifth and Fourteenth Amendments, so it would be anomalous to use a different standard for each one. Moreover, in rejecting the *Mathews* v. *Eldridge* test, the Court in *Medina* relied on *Dowling* v. *United States*, 493 U.S. 342, 352 (1990), and *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977), both of which articulated a similar standard under the Fifth Amendment. 112 S. Ct. at 2576-2577. The Court's subsequent decision in *Herrera* is also inconsistent with petitioner's claim. The Court relied heavily on the history of Rule 33, Fed. R. Crim. P., in resolving the due process question at issue in that case. 113 S. Ct. at 864-865.

According to petitioner, due process requires that military judges at the trial and appellate levels have a fixed term of office in order to ensure their independence from their superiors and from the government in general. Otherwise, he claims, there is a risk that military judges will skew their decisions in the government's favor (or at least allow themselves to be influenced by that concern) in order to avoid being transferred from duty in the military justice system to other military duties, with a resulting injury to their professional careers.

Petitioner's claim is, in effect, a claim of implied bias. This Court, however, has consistently refused to adopt a rule of implied bias in other, related contexts. For example, *Dennis* v. *United States*, 339 U.S. 162 (1950), involved a contempt conviction for failure to appear before the House Un-American Activities Committee. The Court rejected the argument that the jury, composed primarily of employees of the United States, was inherently biased. Dennis argued that the employees, who were subject to an executive order providing for their discharge upon reasonable grounds to believe that they were disloyal to the government, would not risk being dismissed by voting for acquittal. The Court rejected that claim of implied bias, noting that the "way is open in every case to raise a contention of bias" and that Dennis had failed to show actual bias on the part of the jurors in his case. *Id.* at 168. More recently, in *Smith* v. *Phillips*, 455 U.S. 209 (1982), this Court rejected the contention that bias should be imputed to a juror who had an application for employment pending with the prosecuting attorney's office at the time of the trial. The Court stated that the "safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge," while not infallible, adequately protect the right to an impartial jury. *Id.* at 217. See

also *Chandler* v. *Florida*, 449 U.S. 560 (1981) (the jurors in a televised trial are not inherently biased toward conviction); *Frazier* v. *United States*, 335 U.S. 497 (1948) (a jury composed entirely of government employees, including one juror and the wife of another person who were employed by the department responsible for enforcing the Act in question, is not inherently biased); *United States* v. *Wood*, 299 U.S. 123 (1936) (government employees are not inherently biased).

Cases in which the Court has found implied bias involve situations in which the decisionmaker stood personally to profit from a decision in the government's favor. For example, *Tumey* v. *Ohio*, 273 U.S. 510 (1927), involved the legality of a procedure by which the mayor's compensation depended on the amount of the fines he collected as a judge. See also *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 822-824 (1986) (judge had a "very similar" lawsuit pending against a party to the case at the time of his decision); *Connally* v. *Georgia*, 429 U.S. 245 (1977) (judge's salary depended in part on the number of search warrants issued); *Gibson* v. *Berryhill*, 411 U.S. 564 (1973) (state administrative board consisted of optometrists in private practice who heard charges filed against licensed optometrists who were competitors of the board members); *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972) (procedure similar to the one in *Tumey*). The procedure at issue in this case—the lack of a fixed term of office—is not remotely similar to the procedures challenged in those cases.

In addition, the military justice system employs safeguards designed to prevent the type of improper influence that petitioner fears. Military judges are subordinates of and specially chosen by the Judge

Advocate General, not by a convening authority,[6] on the basis of their experience and expertise in military criminal law. Art. 26(b), UCMJ, 10 U.S.C. 826(b); Rule for Courts-Martial 503(b), *Manual for Courts-Martial, United States—1984*. The convening authority and his staff cannot prepare or review any report about a judge's fitness in the performance of his judicial duties. Art. 26(c), UCMJ, 10 U.S.C. 826(c). Article 98, UCMJ, 10 U.S.C. 898, makes it a crime to violate the provisions of the UCMJ regulating court-martial proceedings. And the Court of Military Appeals has proved its willingness to consider a defendant's claim of command influence. See Pet. App. 34a-35a. In light of these protections, Congress's decision not to grant tenure to military judges does not give rise to an intolerable systemic danger that trials and appeals will be unfair. Petitioner's claim to the contrary does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] The "convening authority" is the commander who convenes the court-martial. The convening authority selects the court-martial members (who are analogous to jurors), directs that the accused be tried for the charged offenses, and conducts a post-trial review of the proceedings.